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No. 82-1983

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROSS R. CALIGURI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the trial court's charge concerning petitioner's alleged withdrawal from the conspiracy was proper.

2. Whether the trial court should have submitted to the jury petitioner's claim of "outrageous" conduct by Drug Enforcement Administration agents in their undercover operation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1983. The petition for a writ of certiorari was filed on June 3, 1983. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of conspiring to possess with intent to distribute a quantity of marijuana in excess of 1,000 pounds, in violation of 21

U.S.C. 846 (Count 1).[1] He was sentenced to six years' imprisonment and a fine of $5,000.[2]

1. The evidence at trial showed that in April and May, 1981, special agents of the Baltimore District Office of the Drug Enforcement Administration ("DEA") posed in an undercover operation as sellers of marijuana. In the course of the operation, they offered to sell some 17,000 pounds of marijuana to a group that included petitioner, Edward Dereeder, and James Hubert.

In late April a government informant named Ronald Poe (C.A. App. 241) called Dereeder, his former associate in drug trafficking, and told him that he had 18,000 pounds of marijuana for sale (*id.* at 391). Poe asked Dereeder if he could collect money for the transaction (*id.* at 392). Dereeder contacted Hubert, to whom he had previously sold marijuana (*id.* at 390, 392). Hubert responded that he would contact petitioner, who could buy a ton or more (*id.* at 392). Hubert later told Dereeder that petitioner was interested in buying, but first wanted to inspect the marijuana (*id.* at 393-394). Between the date of Poe's call and May 11, 1981, a number of other conversations took place among members of the conspiracy, including petitioner. On one occasion Dereeder spoke with petitioner on the phone. Petitioner told Dereeder to go to Maryland, inspect the marijuana, verify that the quantity was available, and report back to him. *Id.* at 395. On another occasion

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[1]In addition to petitioner, Edward L. Dereeder, James P. Hubert, George O. Ferguson, Leslie A. Rolph, John Lane, Jr., and John Fulgham were also indicted on three counts. Counts 2 and 3 charged possession of marijuana with intent to distribute, in violation of 21 U.S.C. 841(a). Dereeder, Rolph, Lane, and Fulgham pleaded guilty. Dereeder testified at petitioner's and Hubert's trial.

[2]Hubert was sentenced to four years' imprisonment and a fine of $5,000.

Hubert and Dereeder visited petitioner at his home. Petitioner at that time again instructed Dereeder to go to Maryland and inspect the marijuana. *Id.* at 539. Hubert later informed Dereeder that petitioner wanted exclusive purchasing rights on the marijuana being offered for sale (*id.* at 402).

On May 13, a tractor trailer carrying 17,000 pounds of marijuana used in the undercover operation was parked at a farm house in Vienna, Maryland (C.A. App. 568-569). That evening Dereeder told DEA agent Robert O'Leary that he had contacted petitioner, who was going to take an "exclusive," and that petitioner would come to Maryland the next day (*id.* at 175-176). On May 15, Dereeder told O'Leary that petitioner would arrive at the Salisbury airport at noon, and that he wanted O'Leary to meet him, which O'Leary agreed to do (*id.* at 182).

Dereeder and Hubert met petitioner at the airport (C.A. App. 183) and introduced him to O'Leary and DEA agent Keith Miller. Petitioner asked Miller "how deep [was] the well?" (Pet. App. 3a n.2). Miller responded that it was deep (C.A. App. 565). Petitioner then asked O'Leary for a sample of the marijuana (*id.* at 188).

After the airport meeting petitioner, Dereeder, and Hubert drove to a restaurant in Ocean City. Dereeder gave petitioner a sample of marijuana he had taken from the tractor trailer the previous evening, and petitioner said he would show the sample to his people (C.A. App. 423-425). They discussed the transportation of the marijuana and its price, and after dinner petitioner left Maryland. During a subsequent telephone call to Hubert petitioner told him that he liked the marijuana, but was concerned about who the sellers were. He asked whether Dereeder knew their identity. *Id.* at 429.

During the weekend of May 16-17, petitioner telephoned Dereeder and voiced his concern that the deal might be an ABSCAM-type operation set up by the government (C.A. App. 432). After reassuring petitioner about the deal (*id.* at 434-435), Dereeder contacted a pilot and asked him to fly petitioner to Maryland (*id.* at 435, 271-272). The trip was later aborted (*id.* at 272, 539).

On May 18, petitioner again spoke with Dereeder by phone, expressed continuing concern about the transaction, and told him that he would not come to Maryland until Hubert had obtained a small load as a sample and brought it to New York (C.A. App. 436).

After that sale was consummated the next day, Hubert and several others were arrested by DEA agents (Pet. App. 3a).

2. Prior to trial, petitioner moved to dismiss the indictment on the ground that his due process rights were violated by the conduct of the undercover operation. The district court reserved ruling on the motion. At the conclusion of the evidence, petitioner sought an instruction submitting the issue of prosecutorial misconduct to the jury (Pet. App. 12a). The request was denied. After the jury returned its verdict, the court conducted a hearing and denied the motion to dismiss (C.A. App. 35).

The trial judge instructed the jury concerning the defense of withdrawal from the conspiracy. Petitioner claimed that he had withdrawn by expressing reluctance to continue his participation because of fear that the deal was an undercover operation. The court instructed the jury that "in order to invoke the withdrawal theory, a defendant must withdraw from the conspiracy before any overt act in furtherance of the conspiracy has been committed." The court stated that "after an overt act [has been] committed, by

some member of the conspiracy, then the defense of withdrawal would not be available to him" (Pet. App. 8a-9a). It rejected a proposed instruction (*id.* at 6a-7a) that the defense was available without regard to the time of withdrawal, as long as the defendant communicated his disavowal to his co-conspirators.

3. The court of appeals held that the district court's withdrawal instruction was a "proper statement of the law" (Pet. App. 4a). It also rejected petitioner's due process claim that his conviction was procured through overreaching by law enforcement authorities. The court observed that, "[d]espite the active role maintained by the Government throughout the investigation, the D.E.A. agents did not press a sale upon an unwilling buyer. Rather, the defendants readily accepted the Government's offer" (*id.* at 5a).

ARGUMENT

1. Petitioner contends (Pet. 14-20) that the trial court erred in instructing the jury that "a defendant must withdraw from the conspiracy before any overt act in furtherance of the conspiracy has been committed" (Pet. App. 8a). He argues (Pet. 18) that, because the conspiracy charged did not require the commission of any overt act, the instruction should have allowed withdrawal at any time before termination of the conspiracy. This claim was properly rejected by the court of appeals, for this case presented no issue of withdrawal, and petitioner was entitled to no instruction on the subject at all.

The general legal principles governing the defense of withdrawal from a conspiracy are well settled. "Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464-465 (1978).

Even after withdrawal, however, a "defendant is still liable * * * for his previous agreement and for the previous acts of his co-conspirators in pursuit of the conspiracy." *United States* v. *Read*, 658 F.2d 1225, 1232 (7th Cir. 1981); *United States* v. *Wooten*, 688 F.2d 941, 947 (4th Cir. 1982); *United States* v. *Nicoll*, 664 F.2d 1308, 1315-1316 & n.7 (5th Cir.), cert. denied, 457 U.S. 1118 (1982); *United States* v. *Lowell*, 649 F.2d 950, 957 (3d Cir. 1981). Thus in conspiracies under 18 U.S.C. 371 withdrawal will exonerate a defendant only if no overt act has been committed. This is because, under the statute, no offense has been committed if there is simply an agreement unaccompanied by an overt act. Once an overt act occurs, the offense is complete. *United States* v. *Nicoll*, 664 F.2d at 1315.[3]

By contrast, a drug conspiracy under 21 U.S.C. 846 is complete upon consummation of the agreement; it does not require commission of an overt act by a participant in the conspiracy. The defense of withdrawal is thus significant in Section 846 conspiracy cases only when the defendant's disavowal of the scheme places his active membership in it outside the period of the statute of limitations. (See note 3, *supra*.) But this case presents no statute of limitations issue. And petitioner's withdrawal (if it in fact occurred) plainly came "too late to avoid liability for the conspiracy." *United States* v. *Nicoll*, 664 F.2d at 1315. Petitioner does not challenge the correctness of the instructions regarding the formation of the agreement or the sufficiency of the evidence to establish his initial membership in the conspiracy. Petitioner's numerous conversations and meetings with undercover DEA agents and his co-conspirators, for the

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[3]Withdrawal may once again become relevant if the time between withdrawal and indictment exceeds the statute of limitations. See, *e.g.*, *United States* v. *Read*, 658 F.2d at 1233; *United States* v. *Lowell*, 649 F.2d at 955-960; *United States* v. *Richardson*, 596 F.2d 157, 164 (6th Cir. 1979).

purpose of settling the details of the drug transactions, consummated the agreement on which the conspiracy charge was based, and precluded the alleged subsequent withdrawal from absolving him of criminal liability.[4]

Even if, as in Section 371 cases, an overt act were required to complete the conspiracy offense, petitioner can have no complaint, since the trial court instructed the jury to acquit petitioner if he took steps to disavow the conspiracy before any overt was committed (Pet. App. 8a).[5]

2. Petitioner also maintains (Pet. 6-14) that the trial court erred in refusing to submit to the jury the question whether the government engaged in improper conduct. This claim is clearly without merit.

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[4]There is no substance to petitioner's contention (Pet. 18-20) that the instruction requiring withdrawal before the commission of any overt act deprived him of a "partial defense." Although withdrawal may preclude liability for substantive acts occurring after the withdrawal, it does not affect the defendant's liability for the conspiracy. *United States* v. *Nicoll*, 664 F.2d at 1315 n.7. Here the only relevant act occurring after petitioner's alleged withdrawal was the May 19, 1981 sale of a small sample load — an act in fact directed by petitioner. Petitioner was not convicted on any substantive charge based on that sale.

[5]Petitioner maintains (Pet. 19), without elaboration, that the court of appeals' decision conflicts with this Court's decision in *United States* v. *United States Gypsum Co.*, *supra*, as well as the decisions of several courts of appeals. *Gypsum* has no bearing on this case, however; withdrawal was an issue in that case because there was a question whether the defendant had continued to participate in the conspiracy within the period of the statute of limitations. See also *United States* v. *Read*, *supra*. Nothing in *Gypsum* modified the rule that, except for statute of limitations purposes, the defense of withdrawal is not available once all the elements of a conspiracy have coalesced.

In *United States* v. *Jimenez*, 622 F.2d 753, 757 (5th Cir. 1980), also cited by petitioner (Pet. 19), the court merely approved a jury instruction tailored to the facts of that case.

The issue whether the government has engaged in conduct so "outrageous" as to violate due process is a question of law for the trial judge, not a factual matter for the jury. As the First Circuit explained in *United States* v. *Johnson*, 565 F.2d 179, 181-182 (1977), cert. denied, 434 U.S. 1075 (1978):

> Under any view, it is the court's province to decide whether defendant's case was such that, if believed, it would fall into the exceptional category mentioned by Justice Powell [in *Hampton* v. *United States*, 425 U.S. 484 (1976)]. If such a determination were left to the jury's unguided discretion, as under the instruction proposed here, the entrapment defense * * * would be transformed into an invitation to twelve jurors to consider in any case whether defendant was treated "fairly." Whatever its possible role in resolving contested factual issues raised by an entrapment defense, the jury is not equipped and should not be permitted to speculate on whether particular facts do or do not amount to fundamental fairness.

See *United States* v. *Russell*, 411 U.S. 423, 441 (1973) (Stewart, J., dissenting) ("the determination of the lawfulness of the Government's conduct must be made — as it is on all questions involving the legality of law enforcement methods — by the trial judge, not the jury"); *Hampton* v. *United States*, 425 U.S. 484, 497 (1976) (Brennan, J., dissenting) (same). The trial judge therefore properly refused to submit to the jury the question whether the government had engaged in overreaching, creating a due process bar to prosecution.

In any event, as a comparison of this case with *Hampton* makes clear, the evidence of governmental "misconduct" was wholly insufficient to warrant an instruction on that defense even if the matter were not for the judge to decide. In *Hampton* the petitioner claimed that government agents

not only bought the heroin he was convicted of distributing, but also supplied it to him. A majority of this Court concluded that those facts did not amount to a denial of due process. 425 U.S. at 490 (opinion of Rehnquist, J.), 491-492 (opinion of Powell, J.). Here the facts disclose nothing more than an offer of sale by the government to a defendant who was willing to purchase more than eight tons of marijuana. "While [there] may some day be * * * a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, * * * the instant case is distinctly not of that breed." *United States* v. *Russell*, 411 U.S. at 431-432.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT P. MACQUEENEY
Attorney

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